

The EU as a community of law

Overview of the role of law in the Union

SUMMARY

The term 'community of law' was popularised by Walter Hallstein in the 1960s. It emphasises that the Community, and now the European Union, is founded on the 'rule of law' principle, and underscores the role of law in the European project, which has been described by political scientists precisely as 'integration through law'. Modern definitions of the 'rule of law' include such elements as the limitation of the powers of public officials by the law, the fact that laws are public, general and apply equally, and finally the presence of an independent, impartial and neutral judiciary. The building blocks of the EU as a community of law have been laid, from the 1950s onwards, in the case law of the Court of Justice.

The ECJ's case law proclaiming numerous general principles of Community law was inspired by the common legal traditions of the Member States. Over time, many such principles became enshrined in the written sources of EU law, notably the Charter of Fundamental Rights and the Treaties. The 'life cycle' of EU law – including its creation, application, interpretation and enforcement – involves various institutional actors. Key roles in the creation of EU law are played by the Commission, Parliament and Council, while the application of EU law on a day-to-day basis is predominantly the task of national courts. Supreme authority to interpret EU law, and to review the compatibility of legislation with the treaties is vested in the ECJ. Individuals – natural and legal persons – enjoy the status of subjects of EU law, and can seek judicial enforcement of their rights based on EU law before national courts. In certain situations they can also seek legal protection directly from the EU courts – the General Court and the Court of Justice.



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Introduction

The expression 'community of law' (*Rechtsgemeinschaft*) – was made famous by Walter Hallstein (1901-1982), first President of the European Commission (1958-1967) who in a speech delivered in March 1962 famously remarked that the Community:

*was not created by military power or political pressure, but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliance we have for the first time the rule of law. The European Economic Community is a community of law [Rechtsgemeinschaft] ... because it serves to realize the idea of law.*¹

The expression 'community of law' alludes to the notion of a 'state of law' (referring inter alia to *Rechstaat*, *état du droit*, *państwo prawa*, *stato di diritto*) which is the equivalent, in continental legal cultures, of the Anglo-American notion of the 'rule of law'. Walter Hallstein's phrase was picked up literally by the European Court of Justice (ECJ) only in 1986, in the case of *Les Verts v Parliament* (C-294/83). However, the building blocks of the EEC as a community of law were laid by the Court much earlier, starting in the 1950s.

The 'rule of law' concept

The origins of the concept of 'rule of law' – to which the expression 'Community of law' clearly alludes – can be traced back to ancient Greek political philosophy, where it was first formulated by Aristotle.² Today, the concept of 'rule of law' is deemed to be central not only for legal discourse, but also for public discourse in general.³ It is understood as comprising three basic elements:⁴

- **government limited by law** – officials must operate within the framework of existing law, and if they wish to change the law, they must follow the prescribed procedures;
- **formal legality** – laws must be laid down in advance (no retroactive laws), they must be general (applicable to everyone in a similar situation), and they must be publicly available (promulgated),
- **rule of law, not men** – the task of applying the law must be entrusted to an independent and unbiased judiciary, which acts in a manner free of passion, prejudice and arbitrariness, and is neutral towards the parties; the judiciary also has the power of judicial review over other branches of government, ensuring that the principles of government limited by law and formal legality are duly followed.

Building a community of law: from ECJ case law to the Charter

Principles of a community of law in early ECJ case law

The basic principles of the rule of law, allowing to speak of the EEC as a 'community of law', were laid down in early ECJ case law.⁵ These included, first of all, four **substantive principles** of the rule of law, including the principle of **legality** (Case 7/56 *Algera*); **legal certainty** (Case 7/56 *Algera*; Case 42/59 *SNUPAT*; Case 265/78 *Ferwerda*); **confidence** in the stability of a legal situation (Case 23/68 *Klomp*, para. 12-14); and **proportionality** (Case 11/70 *Internationale Handelsgesellschaft*; Case 147/81 *Merkur*; Case 15/83 *Denkavit*).

These substantive principles were supplemented by a number of **procedural guarantees** embodying the rule of law, such as the right to **be heard** (Case 32/62 *Alvis*), the right of **defence** (Case 155/79 *AM & S Europe*), the right of **access to the file** (Case 85/76 *Hoffmann-La Roche*), and the duty of the authority to **duly motivate** its decision (Case C-42/01 *Portugal v Commission*).

Codification of the principles of the rule of law in primary law

The principles of the rule of law, stemming from the common traditions of the Member States and adopted as general principles of EU law in ECJ case law, have been, to a great extent, codified in primary law – in particular the [Treaty on European Union](#) (TEU) and the [Charter of Fundamental Rights](#) (CFR).

In the TEU's preamble, the Member States confirm their 'attachment to the principles ... of the rule of law'. This idea is reiterated in Article 2 TEU which indicates that the EU 'is founded on ... rule of law', and that these 'values are common to the Member States'. The principle of the rule of law is therefore treated as one of the EU's values which – in light of Article 3(1) TEU – the Union promotes. Furthermore, under Article 21(1) TEU, the rule of law (among other values, such as democracy and human rights) is to guide EU action on the international scene. More specifically, by virtue of Article 21(2)(b) TEU, the EU defines and pursues its external policies and actions, inter alia to 'consolidate and support democracy, the rule of law, human rights and the principles of international law'. Elements of the rule of law are also codified in the Charter. In particular, Article 41 provides for the [right to good administration](#), and Article 47 provides for the **right to an effective remedy and a fair trial**.

Integration through law

Political scientists, describing the European integration project, often refer to the notion of 'integration through law',⁶ in order to emphasise the special role of law in the EU. Indeed, the role of law, as a sphere of social life distinct from politics and the economy,⁷ has been special in European integration. In contrast to projects of (merely) political and (merely) economic integration, the European project has been characterised, from the outset, by the crucial role of law in integrating the Member States. The rules and principles of EU law have contributed to European integration in three principal ways: (1) by replacing divergent rules of national law by the uniform rule of EU regulations; (2) by approximating divergent rules of national law ('positive harmonisation' by directives); and (3) by removing legal obstacles on the internal market which infringe the fundamental freedoms ('negative harmonisation' by ECJ case law).

EU legal instruments for achieving integration through law

Unification through regulations

Regulations are directly applicable EU instruments (Article 288 TFEU) which, as all EU law, enjoy priority before national legislation. Hence, in areas where the law has been unified by an EU regulation, only EU rules are applicable.

Positive harmonisation through directives

The EU legislature adopts directives which are directed to the Member States (Article 288 TFEU). It is up to national legislators to implement (transpose) directives into national law in order to achieve the results prescribed in each directive. Directives are referred to as 'two-stage legislation', because – in contrast to regulations – they are addressed to the Member States and not to private parties. Only in the second stage, when Member States transpose the directive into their national laws, are the rules (of the national implementing measures) addressed to all legal subjects (citizens, companies, etc.).

A **minimum harmonisation** directive contains semi-mandatory rules directed to the Member States. They need to implement the minimum standard of protection (e.g. of consumers) required by the directive.⁸ However, they may introduce or maintain a higher level of protection, provided that they do not infringe the fundamental freedoms of the

internal market. In contrast, a **maximum harmonisation** directive must be implemented by the Member State without any modifications, e.g. granting a higher level of protection to consumers. This makes maximum harmonisation directives similar to regulations.

Negative harmonisation through case law

Negative harmonisation consists of the ECJ declaring certain types of national rules as incompatible with the Treaty freedoms, for instance the free movement of goods. In areas not subject to legal unification or harmonisation, negative harmonisation has ensured the proper functioning of the internal market through the mutual recognition of national rules by other Member States. The trend towards negative harmonisation started in the 1970s, inaugurated by such cases as *Dasonville* (8/74) and *Cassis de Dijon* (120/78). This line in ECJ case law has been based on the assumption that certain rules imposed by the Member States may actually amount to barriers to the free movement of goods, even if they are not openly discriminatory.

Creation, application, interpretation and enforcement of EU law

Creation and judicial development of EU law

Principle of conferral

Unlike national legislatures, which are, in principle, free to enact legislation in any field they wish (with the exception of areas of exclusive EU competence), EU co-legislators are bound by the will of the Member States, expressed in the Treaties, laying down the precise fields of potential EU legislative activity. This is in line with the principle of conferral (Article 5(2) TEU), according to which the EU has only those competences conferred upon it by the Member States.

Legislative procedure

The task of creating new EU laws falls predominantly on the co-legislators (Parliament and Council) which, however, may act only on the basis of a proposal submitted by the Commission (Article 17 TEU). However, Article 225 TFEU empowers the European Parliament to call upon the Commission to present a legislative proposal (indirect legislative initiative).⁹ A right of indirect legislative initiative has also been granted to the Council (Article 241 TFEU), as well as to 1 million EU citizens (European Citizens' Initiative, Article 11(4) TEU). Since the Lisbon Treaty, the Commission must give reasons for any refusal to propose legislation following a request from the Parliament.

Judicial review of EU legislation

The conformity of EU legislation with the Treaties (including the limits of EU competences in line with the principle of conferral) is guaranteed by the ECJ, which performs judicial review of EU legislation in line with Article 263 TFEU (action for annulment). The power to trigger judicial review rests with a Member State, the European Parliament, the Council or the Commission. The Court of Auditors, the European Central Bank and the Committee of the Regions may also trigger an action for annulment in order to protect their prerogatives. Moreover, in certain cases, individuals too may trigger this procedure (see below). An action for annulment pursuant to Article 263 TFEU must be based on one of the following grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. The deadline for filing an action for annulment is two months from the publication of the contested legislative act.

Application of EU law

A specific feature of the EU constitutional set-up is the role of the courts and administrative bodies of the Member States in the application, interpretation and enforcement of EU law. It is the national courts and administrative bodies which have the task of applying EU law on a daily basis. In fact, the ECJ cannot directly resolve disputes before national courts, making national judges actual 'engines' of integration through European law.¹⁰ National courts and administrative authorities can apply EU law either directly, if they base their decision on an act of EU law, or indirectly, if the national judge or official acts on the basis of a provision of national law which implements a provision of EU law. The first case – direct application of EU law – occurs whenever national judges and officials apply EU regulations or, which happens somewhat less frequently, the EU Treaties. The second case concerns the application of national rules which implement EU directives.

Duty to respect the EU Charter of Fundamental Rights

Whenever national judges or administrative bodies act within the sphere of EU law, they have the duty to take into consideration the [EU Charter of Fundamental Rights](#). This follows explicitly from Article 51 of the Charter which provides that it is 'addressed ... to the Member States only when they are implementing Union law'. Whenever they do, they must 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'.

Procedural autonomy and principles of equivalence and effectiveness

National courts and administrative bodies enjoy, in principle, 'procedural autonomy' when applying EU law. This means that unless there are EU rules specifically prescribing how the administrative or judicial proceedings should be conducted, the Member States are free to lay down their procedural rules. However, the most important limitation to the Member States' procedural autonomy is to be found in the principles of equivalence and effectiveness, first proclaimed by the ECJ in Case 33/76 [Rewe-Zentralfinanz](#). Under the **principle of equivalence**, Member States must treat rights granted under EU law on an equal footing to rights granted under domestic law. Under the **principle of effectiveness**, the Member States must ensure that the rights granted under EU law are effectively enforced.¹¹

Application of EU law by the Commission in individual cases

In certain areas of the law, such as antitrust, state aid, public procurement for the EU institutions, as well as funding from the EU budget administered by the Commission, the latter takes individual decisions, thereby applying EU law in individual cases. EU agencies and bodies are also sometimes empowered to take individual decisions. For instance, the [EU Intellectual Property Office](#) (formerly the Office for Harmonization in the Internal Market, OHIM) in Alicante delivers decisions in individual cases regarding trademarks. All individual decisions taken by the Commission or other EU institutions, bodies or agencies are subject to judicial review (action for annulment – Article 263 TFEU). Cases are heard by the General Court, and there is a possibility of appeal to the Court of Justice.

In 2015,¹² the General Court received **382 direct actions** (mainly for annulment), of which 342 were brought by individuals. In the same period, it also received 342 cases concerning intellectual and industrial property – appeals from OHIM.

Interpretation and judicial development of EU law

Preliminary reference procedure

Whilst the day-to-day interpretation, application and enforcement of EU law is the task of national judicial and administrative authorities, the latter may harbour doubts as to the interpretation of a given provision of EU law. If such a doubt arises before a court or tribunal, it may refer the issue to the Court of Justice. This is possible only if the question regarding the interpretation of EU law or the conformity of an EU act of secondary law (directive, regulation, decision) with EU primary law (Treaties, Charter) is necessary for that court or tribunal to give a decision. Therefore, general and abstract questions (even if practically relevant – but not in a concrete case), as well as purely hypothetical questions are not admissible.

Once the ECJ gives its ruling, it is binding on the national court which submitted the question. However, according to the case law of the ECJ, the interpretation of EU law given by that Court in the preliminary reference procedure is binding not only in the dispute in which the question was raised (*inter partes* effect), but it also has general binding force for all judicial and administrative authorities in the Member States (*erga omnes* effect) (Cases 283/81 [CILFIT](#) and C-10/97 [IN.CO.GE.](#)). As a result, national judges – whenever they apply EU law directly or indirectly – must follow earlier interpretations of that law given by the ECJ.

In 2015,¹³ the ECJ decided on **404 preliminary references**. At the same time, 436 new preliminary references were submitted, the largest numbers originating from Germany (79), Italy (47), the Netherlands (40), Spain (36) and Belgium (32). The topics of preliminary references decided in 2015 were concerned mainly with free movement and internal market law (74 cases), taxation (55 cases), intellectual property (51 cases), competition and state aid (49 cases), as well as the area of freedom, security and justice (also 49 cases).

Methods of interpretation of EU law

When interpreting EU law, the CJEU pays particular attention to the aim and purpose of EU law (teleological interpretation), rather than focusing exclusively on the wording of the provisions (linguistic interpretation).¹⁴ This is explained by numerous factors, in particular the open-ended and policy-oriented rules of the EU Treaties, as well as by EU legal multilingualism.¹⁵ Under the latter principle, all EU law is equally authentic in all language versions. Hence, the Court cannot rely on the wording of a single version, as a national court can, in order to give an interpretation of the legal provision under consideration. Therefore, in order to decode the meaning of a legal rule, the Court analyses it especially in the light of its purpose (teleological interpretation) as well as its context (systemic interpretation).

Harmonious interpretation by national courts

The interpretation of EU law provided by the ECJ is binding on national courts. This applies not only to situations when a given national court referred a particular question under the preliminary ruling procedure, but to all situations when a national court applies EU law directly (e.g. when it applies an EU regulation) or indirectly (e.g. when it applies national rules implementing an EU directive). A national court, when interpreting national rules implementing EU law, must take into account the EU directive which was implemented. This is known as the principle of 'harmonious interpretation' and has been proclaimed in ECJ case law (Cases 14/83 [Von Kolson](#), C-106/89 [Marleasing](#); C-397/01 [Pfeiffer](#) and C-555/07 [Kücükdeveci](#)). This also extends to following guidance given by the ECJ in earlier case law (see above).

Judicial development of EU law by the ECJ

Apart from being changed by legislation, EU law is also developed (*richterliche Rechtsfortbildung*) through the case law of the ECJ. As early as 1955, the Court, noting that a certain issue was not regulated explicitly in the Treaties, pointed out that 'unless [it] is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the member countries' (Case 7/56 *Algera*, page 55). It is worth noting that some of the fundamental principles of EU law, such as supremacy and direct effect, were proclaimed by the ECJ, without having been spelt out previously in the Treaties.¹⁶ This allows describing the role of the ECJ not only as that of purely applying and interpreting EU law, but also contributing to its development, especially through the formulation of general principles of EU law.¹⁷ Some authors speak in this context of 'de facto precedent' at the ECJ.¹⁸

Enforcement of EU law *vis-à-vis* the Member States

Whilst EU law is being applied, on a daily basis, by national judges adjudicating disputes which fall into the scope of EU law, they do not necessarily have the means (legal and political) to ensure that EU law is correctly implemented and respected by the authorities of the Member States. To this end, appropriate powers have been vested in the Commission as 'guardian of the treaties', and in the ECJ as the court competent to decide disputes regarding violations of EU law by the Member States. According to Article 17 TFEU, the Commission 'ensure[s] the application of the Treaties and of the measures adopted by the institutions pursuant to them', and 'oversees the application' of EU law.

Infringement proceedings

If the Commission considers that a Member State has failed to fulfil its obligations following from the Treaties, it may take legal steps against it. According to Article 258 TFEU, the first step the Commission must take in such a situation is to deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its observations (by letter of formal notice). Only if that Member State does not comply with the opinion within the period laid down by the Commission, may the Commission launch a legal action against that state before the ECJ.

Main areas concerned

Recently, the [Commission's focus](#) in ensuring the proper implementation and application of EU law at national level has been on the following areas:

- **public economic law**, including antitrust and state aid law, electronic communications law, energy law (especially transposition of the [Offshore Safety Directive](#)), internal market law (especially correct implementation of the [Services Directive](#)), banking law (especially the [Bank Recovery Directive](#) and [Deposit Guarantee Directive](#)), agricultural law and transport law;
- **other areas of administrative law**, including education law (ensuring equal treatment of EU citizens studying in another EU country), environmental law (especially waste management and air quality), public health law (especially the implementation of the [Cross Border Healthcare Directive](#)), and migration law (especially monitoring the implementation of the [Asylum Procedures Directive](#), the [Reception Conditions Directive](#) and the [Qualifications Directive](#));
- **private law, including consumer law** (the correct implementation of the [Late Payments Directive](#), [Consumer Rights Directive](#), [Unfair Commercial Practices Directive](#) and [Package Travel Directive](#)).

In 2015, the Commission sent **742 letters of formal notice** to Member States, and **248 reasoned opinions**.¹⁹ The largest numbers of reasoned opinions were addressed to Poland (21), Spain (19), Greece (16) and Italy, France and Luxembourg (13 each). At the other end of the spectrum, only one was sent to Croatia, two to Latvia and four each to Denmark and Slovakia. As of 31 December 2015, a total of **1 368 infringement cases** remained open, with the largest number of cases pending against Italy (89), Germany (89), Spain (83), Greece (82), France (80) and Poland (78). At the same time, below 30 cases were on-going against Croatia (21), Denmark (23), Malta (24), Estonia (26) and Latvia (28).

Article 260(1) TFEU provides that if the ECJ finds that the defendant Member State indeed failed to fulfil its obligations under the Treaties, that state must 'take the necessary measures to comply with the judgment'.

In 2015, the ECJ gave **25 judgments in infringement** cases. The Commission won in 82 % of them. Poland lost in four cases; Belgium, Bulgaria, France, Germany, Greece and Luxembourg lost in two cases each, and the UK lost one case. The Commission lost in two cases brought against Slovakia, and one brought against the UK.

However, not all Member States comply with a judgment declaring its infringement, and therefore Article 260(2) TFEU provides that the Commission – if it believes that the judgment has not been complied with – may bring the case back to the ECJ. However, before doing so, it must give the Member State the opportunity to submit its observations. In an action under Article 260(2) TFEU, the Commission specifies the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Commission's action is successful, the ECJ may impose such a lump sum or penalty payment, although it is not obligatory.

At the end of 2015, **85 'persistent' infringement proceedings** were open against Member States which, in the Commission's view, did not comply with a judgment rendered under Article 258 TFEU. The largest number of cases were open against Greece (10), Poland (8) and Spain (7), and were related to environment (35), transport (12), taxation (9) and health and consumer protection (7). In 2015, the Court delivered three judgments against Member States persistently infringing EU law, and **imposed penalty payments on two countries** – Italy and Greece. In the case of C-653/13 [Commission v Italy](#) (concerning waste management in the Campania region) the ECJ imposed a lump-sum payment of €20 million and a penalty of €120 000 for each day of non-compliance with the original judgment. In the case of C-367/14 [Commission v Italy](#) (concerning state aid in Venice and Chioggia) the ECJ imposed a lump-sum payment of €30 million and a periodic penalty: €12 million for each half year of non-compliance with the original judgment under Article 258 TFEU). In case C-167/14 [Commission v Greece](#) (concerning treatment of urban waste water) the lump sum was set at €10 million and the periodic penalty at €3.64 million for each half year of non-compliance with the original judgment.

Rule of law procedure – preventive mechanism²⁰

The '[rule of law procedure](#)' which can be launched against a Member State is in fact concerned with a 'breach of EU values' by an EU country. Whilst the notion of 'values' is rather vague, it is nonetheless the case that Article 2 TEU clearly includes the 'rule of law' amongst the 'values ... common to the Member States'. Hence, a breach of the rule of law in a Member State can lead to the triggering of the procedure established in Article 7 TEU. The procedure consists of two distinct mechanisms: the 'preventive mechanism', established by the Nice Treaty, and the 'sanctions mechanism', established by the Amsterdam Treaty. Both mechanisms are independent of each other, meaning that the sanctions mechanism can be triggered without going through the preventive mechanism.

Under the 'preventive mechanism' (Article 7(1) TEU), the Council may determine that there is a clear **risk of a serious breach** of the EU values by a Member State. The procedure can be initiated by the Parliament, Commission or one third of EU Member States. The Council issues a decision by a majority of four fifths of its members after having received Parliament's consent which, in turn, requires a two-thirds majority of the votes cast, representing an absolute majority of all Members (Article 354(4) TFEU). The Member State incriminated does not vote in the Council.

Rule of law procedure – sanctions mechanism

The sanctions mechanism (Article 7(2)-(3) TEU) can be triggered by the Commission or one third of the Member States, but not by the Parliament. In the first phase, the European Council (Heads of State or Government) determines by unanimity and after obtaining Parliament's consent (by a two-thirds majority of the votes cast, and an absolute majority of Members) the **existence of a serious and persistent breach** of EU values by a Member State. The incriminated Member State does not vote in the European Council.

In June 2016, the Commission has issued a rule of law [recommendation](#) to Poland in June 2016. This document followed an orientation debate held by the College of Commissioners in January 2016, during which the Commission decided to examine the situation under the Rule of Law Framework, mandating First Vice-President Timmermans to enter into a dialogue with the Polish authorities. In its recommendation, the Commission expressed the opinion that there is a **'systemic threat' to the rule of law in Poland** in connection with the dispute concerning the composition of Poland's constitutional court and the constitutionality of its legal framework. The Polish government [does not agree](#) with the Commission's recommendation, describing it as 'groundless' and 'one-sided'.

Citizens in a community of law

A community of states and citizens

Whilst the original text of the Treaties did not provide explicitly for individual rights,²¹ the ECJ's landmark decisions of the early 1960s (Case 26/62 [Van Gend & Loos](#) and Case 6/64 [Costa v E.N.E.L.](#)) proclaimed that the Community is not only a legal order between states (as a classic international organisation), but also a community of states and citizens. Therefore, the subjects of EU law are not only its Member States, but also private individuals – natural and legal persons, both under private and public law. Hence, individuals can rely directly on certain rights provided for in EU law before national courts, which the latter need to protect (**direct effect** of EU law), even in case of divergent rules of national law which need to be set aside (**supremacy** of EU law). The Member States confirmed the special status of individuals in the EU legal order by introducing, in the Treaty of Maastricht (1992), the concept of EU citizenship conceived as a legal bond linking the nationals of EU Member States with the Union as such.

Fundamental rights as general principles of EU law and their recognition in the charter

The legal status of individuals under EU law was further strengthened by the introduction by the ECJ of fundamental rights as general principles of EU law. In Case 29/69 [Stauder v Ulm](#), the ECJ mentioned that '**fundamental human rights**' are not only 'enshrined in the general principles of Community law' but also 'protected by the Court'. In later case law, the ECJ recognised such fundamental rights²² as **the right to dignity and personal integrity** (Case C-377/98 [Netherlands v Parliament and Council](#)), **the right to freedom of expression** (Case C-288/89 [Gouda](#)), **the right to equality before the law** (Case C-15/95 [EARL](#); C-292/97 [Karlsson](#)), and **the right to good administration** (Case 222/86 [Heylens](#);

Case 374/87 [Orkem](#); Case C-255/90 P [Burban](#)). The introduction of fundamental rights back in the 1960s is seen as a consequence of the earlier proclamation of the principles of direct effect and supremacy, which would have been questioned by national courts if they were not backed by fundamental rights at EU level.²³ A further step in making EU citizens subjects of Union law was the entry into force, on 1 December 2009, of the Charter of Fundamental Rights, as a legally binding instrument of primary EU law. As judge Marek Safjan pointed out, the rules of the Charter, frequently referred to in ECJ case law, 'influence the process of interpretation, of determination of the very content of particular norms [of EU law], their extent and legal consequences'.²⁴

Protection of individual rights under EU law before national courts

Vertical direct effect of Treaty provisions

The possibility for individuals to invoke Treaty provisions *vis-à-vis* national authorities (vertical direct effect of the Treaties) was already allowed by the ECJ in [Van Gend & Loos](#) with regard to Article 12 of the EEC Treaty, introducing a standstill on tariffs in intra-Community trade. Later ECJ case law extended direct effect to further Treaty articles.

Treaty provisions having vertical direct effect²⁵

Article 21(1) TFEU (free movement of citizens); Article 28 TFEU (customs union); Articles 34-35 TFEU (prohibition of quantitative restrictions in intra-EU trade); Article 37(1) TFEU (state commercial monopolies); Article 45 TFEU (free movement of workers); Article 49 TFEU (freedom of establishment); Article 56-57 TFEU (free movement of services); Article 63(1) TFEU (free movement of capital and payments); Article 101(1)-(2) TFEU (antitrust rules); Article 102 TFEU (prohibition of abuse of dominant market position); Article 108(3) TFEU (state aid); Article 110 TFEU (non-discrimination in tax matters); Article 157 TFEU (prohibition of gender discrimination).

Vertical and horizontal direct effect of regulations

Regulations – which are binding directly and in their entirety – have both vertical and horizontal direct effect with regard to individuals. However, in order to be directly applicable in an individual dispute, the rule in question must be clear, precise and leave no discretion to the Member States (Case 9/73 [Schlüter](#)).

Vertical direct effect of directives

Directives are predominantly addressed to the Member States (Article 288 TFEU) which need to implement them. However, under certain conditions they can exert vertical direct effect (*vis-à-vis* national authorities). In Case C-91/92 [Dori](#) the ECJ ruled that if a directive has not been implemented in a timely fashion, individuals who would have enjoyed rights under the national implementing provisions may claim damages from the state which failed to implement the directive. However, the Court excluded the possibility of horizontal direct effect, i.e. the possibility of enforcing rights envisaged in an unimplemented directive *vis-à-vis* another individual ([Dori](#), para. 30). Detailed conditions of state liability *vis-à-vis* individuals for breach of EU law were laid down in the 1996 judgment, [Brasserie du Pecheur](#) (C-46/93).

Horizontal direct effect of Treaty provisions

Whilst the direct effect of Treaty provisions is mainly vertical (*vis-à-vis* the Member States), some Treaty provisions are also capable of being enforced in disputes between two individuals. This is the case, for instance, with Article 49 TFEU on freedom of establishment (Case C-438/05 [Viking](#)) and Article 102 TFEU prohibiting agreements in restraint of competition (Case C-453/09 [Courage](#)).

Standing of individuals before EU courts

Action for annulment of an EU act

Article 263(4) TFEU provides that any natural or legal person may bring an action for annulment of an EU act intended to produce legal effects, if that act is: (1) addressed to that person; (2) of direct and individual concern to that person; and (3) it is a regulatory act which is of direct concern to that person and does not need to be further implemented. The action may be based on one of the following grounds: (1) lack of competence; (2) infringement of an essential procedural requirement; (3) infringement of the Treaties; (4) infringement of any rule of law relating to the application of the Treaties; or (5) misuse of powers. The action for annulment must be brought within two months of the day when the act in question was published or notified. If it was neither published nor notified, the deadline starts to run from the day on which the individual learned about the act.

Action for failure to act

Article 265 TFEU provides that in case the European Parliament, the European Council, the Council of the EU, the Commission or the European Central Bank fails to act, in infringement of the Treaties, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

Action for damages against the EU

Article 340 TFEU grants individuals the right to bring an action for damages against the EU institutions.²⁶ According to ECJ case law (C-352/98 P [Bergaderm](#)), the EU incurs liability only if there is a 'sufficiently serious' breach of EU law, i.e. if the institution concerned 'manifestly and gravely disregarded the limits on its discretion'. If the institution had no discretion, but still acted illegally, then 'the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach'. Apart from a sufficiently serious breach, the individual in question (usually a company) needs to prove loss and causal link between that loss and the illegal action or forbearance.

Main references

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